

BEFORE THE DISCIPLINARY COMMISSION OF THE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF)
THE STATE BAR OF ARIZONA,) Nos. 00-0258 & 00-0698
)
WALTER E. MOAK)
Bar No. 004849) DISCIPLINARY COMMISSION
) REPORT
RESPONDENT.)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on November 16, 2002, pursuant to Rule 53(d) Ariz. R. S. Ct., for review of the Hearing Officer's Report filed, August 16, 2002. Respondent requested oral argument. The Respondent, Respondent's counsel and counsel for the State Bar were present.

Decision

The Commission's standard of review is set forth in Rule 53(d)2, which states the Commission reviews questions of law *de novo* and applies a clearly erroneous standard to questions of fact. Great deference is given to Hearing Officer recommendations, *Matter of Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987). The Commission found the Hearing Officer's report exceptionally thorough; however, the nine (9) members of the Commission unanimously recommend adopting the Hearing Officer's findings of fact and conclusions of law, but recommend modifying the sanction of a six (6) month and one (1) day suspension and costs to reflect a six (6) month suspension and costs.

Discussion

Based on the findings of Hearing Officer 9X, the Commission found clear and convincing evidence that Respondent violated Rule 42, specifically:¹

ER 1.2	(scope of representation)	1 Violation
ER 1.3	(diligence)	1 Violation
ER 1.4	(communication)	1 Violation
ER 1.7(b)	(conflict of interest)	1 Violation
ER 1.8(a)	(conflict of interest-prohibited transactions)	1 Violation
ER 1.8(e)	(conflict of interest-financial assistance)	1 Violation
ER 1.8(j) ²	(acquiring proprietary interest in cause of action)	1 Violation
ER 1.9	(conflict of interest-former client)	1 Violation
ER 3.3	(candor toward the tribunal)	2 Violations
ER 4.1	(truthfulness in statements to others)	2 Violations
ER 8.4(c)	(misconduct: dishonesty, fraud, deceit or misrepresentation)	2 Violations
ER 8.4(d)	(misconduct: prejudicial to the administration of justice)	2 Violations
SCR 51(e)	(willful disobedience or violation of a rule)	1 Violation

In Count One, Respondent represented a husband and wife in a personal injury matter. The facts became complicated as to the cause of the accident and the husband/driver

¹ The Hearing Officer clarified the State Bar did not prove by clear and convincing evidence a violation of ER 4.1 in Count One; however it is inadvertently listed in the Conclusions of Law. See Hearing Officer's Report, p.15:13-17. Additionally, the Hearing Officer inadvertently lists a violation of ER 4.2. See Hearing Officer's Report, p. 16:8.

² The Hearing Officer inadvertently lists a violation of ER 1.8(i) instead of (j). See Hearing Officer's Report p. 17:6.

1 was noticed as a non-party at fault by the third party negligent driver. Later in the
2 representation, the Respondent signed a complaint for the wife, which included her husband
3 as a defendant even though Respondent had not been authorized by the wife to sign her
4 name on a complaint and the husband had not consented to the Respondent suing him.

5 In Count Two, Respondent represented a client who was injured in an automobile
6 accident in 1995 in La Paz County and subsequently injured in a car accident in 1998 in Gila
7 County. The Gila County accident was not disclosed to opposing counsel or the court in La
8 Paz County. The La Paz case went to trial. Prior to the trial, the Respondent knew that the
9 doctors attributed a significant brain injury to the second accident. Nonetheless, the client's
10 appearance and the Respondent's argument led the jury to believe that the outward
11 symptoms of the brain injury, as well as the loss of cognitive functioning, were related to the
12 first accident instead of the undisclosed second accident. The case ended in an \$800,000.00
13 verdict that was subsequently set aside when defense counsel found out about the Gila
14 County accident. Respondent was personally assessed the other party's attorney fees, which
15 he paid, apologized to the court, and settled a malpractice claim brought by his client.
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17 In Count Three, Respondent's wife loaned money to the client in Count Two on four
18 separate occasions. She had the client sign a promissory note that was drafted by the
19 Respondent. The client was not advised to obtain independent counseling from an attorney
20 regarding the arrangements of this loan agreement, which included 25% interest.
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22 In determining the appropriate sanction, the Supreme Court considers the American
23 Bar Association's *STANDARDS FOR IMPOSING LAWYER SANCTIONS* (1992) (ABA *STANDARDS*) a
24 suitable guideline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court
25 and the Commission are consistent in utilizing the ABA *STANDARDS* to determine appropriate
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1 sanctions for attorney discipline. In imposing a sanction after a finding of misconduct,
2 consideration is given to the duty violated, the lawyer's mental state, the actual or potential
3 injury caused by the misconduct and the existence of aggravating and mitigating factors.
4 *See ABA STANDARDS 3.0.*

5 ABA STANDARDS 6.1 addresses false statements, fraud and misrepresentation. A
6 review of ABA STANDARDS 6.12 indicates that suspension is the presumptive sanction for
7 Respondent's particular misconduct. The Respondent knowingly violated his duty to the
8 legal system and caused potential injury.

9 The Commission, having concluded that suspension is warranted, reviewed ABA
10 STANDARDS 9.22 and 9.32, aggravating and mitigating factors and found four (4) aggravating
11 factors present in the record: 9.22(b) dishonest or selfish motive, (c) pattern of misconduct
12 (d) multiple offenses, and (i) substantial experience in the practice of law.³ There are four
13 (4) factors in mitigation: 9.32(a) absence of a prior disciplinary record, (e) full and free
14 disclosure to disciplinary board or cooperative attitude toward proceedings, (k) imposition
15 of other penalties or sanctions,⁴ and (l) remorse.

17 The Commission considered the proportionality analysis provided and found one (1)
18 case particularly instructive. In *Matter of Alcorn and Feola*, 202 Ariz. 62, 41 P.3d 600
19 (2002), the respondents received a six (6) month suspension for violating ERs 8.4(c) and (d).
20 The parties involved in the *Alcorn and Feola* "sham trial" both had knowledge of the
21 conduct; conversely, only the Respondent was aware of his lack of disclosure in the instant
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26 ³ Respondent was admitted to the State Bar of Arizona on April 30, 1977.

⁴ The sanction of \$31,493.82, has been paid in full.

1 matter. The Supreme Court found that the misconduct in *Alcorn and Feola* caused very
2 serious injury; whereas, the Respondent's conduct caused potential injury – thanks to the
3 setting aside of the verdict in Count Two. Finally, although the Court found a lack of
4 dishonest or selfish motive in *Alcorn and Feola*, it did not attach much mitigating weight to
5 the factor and further stated in it's Opinion that, "...doing everything within one's power to
6 help one's client is not the same as license to do anything. The ethical rules set limits to
7 how lawyers may assist their clients and require that lawyers' primary allegiance be to the
8 system of justice." The Commission concludes that although the Respondent had a
9 dishonest and selfish motive, his misconduct was no more (and no less) egregious than that
10 of *Alcorn and Feola*. Further, Respondent has expressed remorse, apologized for his
11 misconduct and has taken steps to rectify the consequences of his actions. As a result,
12 requiring him to apply for reinstatement and provide proof of rehabilitation would not only
13 be punitive but also unnecessary under these circumstances. Therefore, a sanction of a six
14 (6) month suspension and costs is sufficient and serves the purposes of attorney discipline.

16 Conclusion

17 The purposes of discipline are to protect the public and deter similar conduct by
18 other lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986); instill public
19 confidence in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 362
20 (1994); and maintain the integrity of the legal system, *In re Fioramonti*, 176 Ariz. 182, 187,
21 859 P.2d 1315, 1320 (1993).

23 Therefore, based on the Hearing Officer's findings of fact and conclusions of law in
24 this case, application of the ABA *STANDARDS*, including aggravating and mitigating factors,
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1 and a proportionality analysis, the Commission recommends a six (6) month suspension and
2 costs.

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4 RESPECTFULLY SUBMITTED this 4th day of December 2002.

5 PETER CAHILL

6 Peter J. Cahill, Chair
7 Disciplinary Commission

8 Original filed with the Disciplinary Clerk
9 this 4th day of December 2002.

10 Copy of the foregoing mailed
11 this 4th day of December 2002, to:

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21 Copy of the foregoing hand-delivered
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/kdl